OVERSEAS UNION BANK LTD.

v.

DAYI SUPERMARKET (IPOH) SDN. BHD.

HIGH COURT MALAYA, IPOH
PEH SWEE CHIN J
[ORIGINATING SUMMONS NO. 357 OF 1985]
8 MAY 1987

CIVIL PROCEDURE: *Amendment to order of Court - Order 42 r. 12 of RHC 1980 - Order 20 r. 11 of RHC 1980 - Should amendment be allowed or separate order made.*

The defendant/chargor applied for an amendment to an order of sale by public auction of the charged land. The amendment sought to add words to the effect that the principal sum was to carry interest at 8% p.a. from date of judgment to date of satisfaction. It was deposed that this was in accordance with O. 42 r. 12 of RHC 1980.

Held:

[1] The liberty to apply was implied in every order without it being expressly reserved. It does not enable a court to vary or amend the substance of its order in any way. However it does enable a Court, to deal with matters arising out of the working out of an order or terms of an order. A separate order would be made instead of allowing the amendment asked for, with such separate order declaring that the interest of the judgment sum concerned should carry interest at 8% p.a. from date of judgment to date of satisfaction.

[2] Since giving the judgment it has been realised that the actual amendment could also be allowed under Slip Rule (O. 20 r. 11 of RHC 1980). This was however merely of academic interest.

Cases referred to:
Fritz v. Hobson [1880] 14 Ch D 542
Cristal v. Cristal [1951] 2 KB 725
Tak Ming Co.Ltd. v. Yee Sang Metal Supplies Co. [1973] 1 All ER 569

Legislation referred to:
Rules of the High Court 1980, O. 20 r. 11, O. 42 r. 12

For the plaintiffs - Tony Wong; M/s. Thevin Chandran Siva Jamal & Wong
For the defendants - Loh Yew Dong; M/s. Loh Yew Dong & Co.

JUDGMENT

Peh Swee Chin J:

The defendant/chargor applied to me to amend an order of sale by public auction of the charged land.

The amendment sought was to add the following, underlined and bracketed words to the order which is set out below together with the underlined words:

Order

Upon Reading the Originating Summons (Encl. 2) dated 15 April 1985 and the affidavit of Chang Boon Hong (Encl. 1) sworn to on 3 April 1985 both filed herein And Uponhearing Encik Jamaluddin Mohd. Din mentioning on behalf of Messrs. Thevin Chandran Siva & Jamal of Counsel for the plaintiffs.

It Is Ordered that the land held under CT No. 9004 for lot No. 103s and Geran 8904 for Lot 104s all in the Town of Ipoh, to be sold by Public Auction on a date to be fixed by the Senior Assistant for the realisation to the sum of RM1,603,299.01 due to the abovenamed plaintiffs as at the date hereof (and thereafter interest at 8% per annum on the principle sum of RM1,300,000 until satisfaction.)

And It Is Ordered that the plaintiffs be at liberty to bid at the sale and in the event to they being declared the purchasers to set off all monies due under the charge at the time of the sale against the purchase price and the balance thereof be paid into Court.

And It Is Also Ordered that the defendant do pay all costs incidental to this application and of the sale and the State or local authority the rent or other outgoings and the Rental Property Gains Tax out of the proceeds of sale.

And It Is Further Ordered that either party be and is hereby at liberty to apply.

Given under my hand and Seal of this Court this 29 August 1985.

Sgd.

(Senior Assistant Registrar)
High Court, Ipoh.

A director of the defendant/chargor deposed to the ground for such amendment as that the judgment sum of RM1,603,299.01 should carry interest at 8% p.a. from date of judgment to date of satisfaction in accordance with O. 42 r. 12 of RHC 1980. It will be obvious that there was a patent omission of an award for interest in the said order.

In his submission, learned Counsel for the applicant for amendment stated to the effect that both the chargor and chargee had been arguing at cross-purposes in that the chargee had asked for interest of more than 8% p.a. (presumably the contractual rate) and that the chargor had contended to the contrary.

Counsel further cited the Supreme Court case of *Supreme Finance v. Koo Sin Ken*, (Supreme Court Civil Appeal No. 101/86) in which it was held a judgment sum must carry interest at the rate of 8% p.a. and no more under O. 42 r. 12 of RHC 1980, and that after the decision of that Supreme Court case, O. 42 r. 12 had since been amended on 11 December 1986 (a date after the date of the Supreme Court Case and after the date of the said order) to enable courts to award interest at the contractual rate.

Learned Counsel for the chargee/plaintiff submitted on the other hand that the said order had been perfected and the Court had no power to rehear or review the matter, unless there was an appeal. He conceded that if the period for filing notice of appeal had not expired, the *ratio decidendi* of the *Supreme Finance's* case would apply, in other words his client would only be entitled at 8% p.a.

A somewhat similar situation had arisen in the case of *Fritz v. Hobson* [1880] 14 Ch D 542. In that case, a judgment at the conclusion of a trial was also perfected, with "liberty to apply" expressly reserved therein. It so happened there was an earlier motion for an interim injunction taken out by the successful plaintiff earlier and the motion was adjourned to the trial. The taxing master refused to allow costs for this motion, which Counsel had omitted to ask for at the trial. A second motion was filed, pursuant to such refusal from the taxing master, seeking amendment or variation of the said perfected judgment.

Fry J held that, with regard to argument that he had no jurisdiction to hear and grant the application, he said: "all orders of the Court carry with them in *gremio* liberty to apply to the Court. The judgment at the trial reserves express liberty to apply". He had, he said, in any

event jurisdiction also to vary the judgment on ground of accidental omission. On the argument that the application was wrong in form and that it ought to have been an application for a direction to the taxing master, his Lordship adopted the following course.

While holding the application for amendment was properly made, he however did not, in effect, allow the amendment actually sought for, but instead made a separate order directing the taxing master to tax the costs of that adjourned motion for interim injunction.

Before proceeding further, I ought to express my views on the liberty to apply. It is implied in every order without its being expressly reserved, please see *Fritz v. Honson, supra.*

It does not enable a court to vary or amend the substance of its order in any way. Thus in *Cristal v. Cristal* [1951] 2 KB 725, in an order relating to possession of the matrimonial home, the husband was ordered to provide a house or bungalow as alternative accommodation for the wife. Subsequently the husband secured a flat and applied to amend the order to include a flat, the Court of Appeal refused to allow it saying there was no change in the circumstances shown.

Such liberty to apply does enable a Court, as was also held in *Cristal v. Cristal, supra,* and in many other cases, to deal with matters arising out of the working out of an order or terms of an order. I revert now to the matters in hand, i.e. the application that was heard before me, and the facts of *Fritz v. Honson, supra,* I have just referred to earlier.

I therefore followed suit, by making a separate order, instead of allowing the amendment asked for, with such separate order declaring that the interest of the judgment sum concerned should carry interest at 8% p.a. from date of judgment to date of satisfaction.

Since giving the judgment, I have also come to the considered view that the actual amendment could also be allowed under the Slip Rule (O. 20 r. 11 of RHC 1980), instead of making a separate order in achieving the same purpose of resolving both Counsels' opposing contentions, in particular, because I have recently come across the Privy Council case of *Tak Ming Co. Ltd. v. Yee Sang Metal Supplies Co.* [1973] 1 All ER 569 in which an omission to award interest in the judgment was held to entitle the Court to vary or amend the judgment by providing for inclusion of an award of interest. An application to amend the judgment so as to include an award of interest was earlier dismissed by the trial Judge on the ground of lack of jurisdiction and the Privy Council finally held that there was indeed such jurisdiction. This is merely for academic interest.

Also found at [1988] 2 CLJ 235